In re: DERWOOD STEWART AND RHONDA STEWART, d/b/a STEWART'S NURSERY, a/k/a STEWART'S FARM, STEWART'S FARM & NURSERY, THE DERWOOD STEWART FAMILY, AND STEWART'S NURSERY FARM STABLES.
HPA Docket No. 99-0028.
Decision and Order as to Derwood Stewart.
Filed September 6, 2001.

HPA – Entry – Baird test – Burton test – Statutory construction – Civil penalty – Disqualification – Extensions of time.

The Judicial Officer (JO) reversed the decision by Chief Administrative Law Judge James W. Hunt (Chief ALJ). The JO: (1) concluded that Respondent entered a horse for the purpose of showing or exhibiting the horse in a horse show, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); (2) assessed Respondent a $2,200 civil penalty; and (3) disqualified Respondent for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The JO stated that pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(vii)). The JO held the Chief ALJ erred by assessing Respondent $2,000 rather than the maximum civil penalty. Further, the JO found no extraordinary circumstances that warranted departure from the established Department policy of imposing the minimum disqualification period for the first violation of the Horse Protection Act. The JO found that Respondent personally performed at least one of the steps necessary for the entry of Respondent's horse in a horse show. Thus, Respondent personally violated 15 U.S.C. § 1824(2)(B). Further, the JO found Respondent entered the horse through an employee who performed numerous steps in the entry process. The JO rejected Respondent's contention that he was not liable for the violation of 15 U.S.C. § 1824(2)(B) under *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982). The JO stated that *Baird* and *Burton* hold that a horse owner cannot be found to have violated 15 U.S.C. § 1824(2)(D) if certain factors are shown to exist. The JO concluded that *Baird* and *Burton* were not applicable to Respondent who was found to have violated 15 U.S.C. § 1824(2)(B). Finally, the JO rejected Respondent's contention that Complainant's appeal petition was late-filed.

Colleen A. Carroll, for Complainant.
L. Thomas Austin and Jennifer Mitchell, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on July 1, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended

(15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice].

Complainant alleges that: (1) on October 28, 1998, Derwood Stewart [hereinafter Respondent], on behalf of Rhonda Stewart, Stewart's Nursery, also known as Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables entered a horse registered as "JKS `O My Jackie O" and also known as "JFK's O My Jackie O" [hereinafter Jackie O] as entry number 392 in class number 24 at the 30th Anniversary National Walking Horse Trainers Show in Shelbyville, Tennessee, while Jackie O was sore, for the purpose of showing or exhibiting Jackie O in that show, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); and (2) on October 28, 1998, Rhonda Stewart, Stewart's Nursery, also known as Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables allowed Respondent to enter Jackie O as entry number 392 in class number 24 at the 30th Anniversary National Walking Horse Trainers Show in Shelbyville, Tennessee, while Jackie O was sore, for the purpose of showing or exhibiting Jackie O in that show, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Amended Compl. ¶¶ 4-5).

On March 2, 2000, Respondent and Rhonda Stewart filed an "Answer to Amended Complaint" denying the allegations in the Amended Complaint.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided at a hearing in Chattanooga, Tennessee, on September 6, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. L. Thomas Austin and Jennifer Mitchell, Dunlap, Tennessee, represented Respondent and Rhonda Stewart.

On March 7, 2001, Complainant filed "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" [hereinafter Complainant's Post-Hearing Brief]. On May 14, 2001, Respondent and Rhonda Stewart filed "Respondents' Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" [hereinafter Respondents' Post-Hearing Brief].

On May 31, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that on October 28, 1998, Respondent entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show, while Jackie O was sore, for the purpose of showing or exhibiting Jackie O in that show, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) assessed Respondent a $2,000 civil

penalty; and (3) dismissed the complaints[1] as to Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables (Initial Decision and Order at 9).

On June 29, 2001, Respondent appealed to the Judicial Officer. On July 23, 2001, Complainant appealed to the Judicial Officer and filed "Complainant's Response to Appeal Petition of Respondent Derwood Stewart." On August 10, 2001, Respondent filed "Respondent Derwood Stewart's Response to Appeal Petition of Complainant" [hereinafter Respondent's Response] in which Respondent requested oral argument before the Judicial Officer. On August 13, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's request for oral argument before the Judicial Officer and a decision as to Respondent.[2]

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except with respect to the sanction imposed by the Chief ALJ. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, except with respect to the sanction and except for minor modifications, the Chief ALJ's Initial Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusion of Law, as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

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[1]Based on the record, I infer the Chief ALJ's reference to "complaints" is a reference to the Complaint filed on July 1, 1999, and the Amended Complaint filed October 4, 1999. However, the Complaint is entirely subsumed within the Amended Complaint. I conclude that the operative pleading in this proceeding is the Amended Complaint and that effective February 8, 2000, when the Chief ALJ issued "Order Amending Complaint," the allegations in the Complaint filed July 1, 1999, were no longer at issue in this proceeding.

[2]The Hearing Clerk served Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables with the Initial Decision and Order on June 4, 2001 (Domestic Return Receipt for Article Number 7099 3400 0014 4579 1225). Complainant did not appeal the Chief ALJ's dismissal of the "complaints" as to Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables. Therefore, in accordance with the Initial Decision and Order and the Rules of Practice, the Initial Decision and Order became final and effective as to Rhonda Stewart, Stewart's Nursery, Stewart's Farm, Stewart's Farm & Nursery, The Derwood Stewart Family, and Stewart's Nursery Farm Stables on July 9, 2001 (Initial Decision and Order at 9; 7 C.F.R. § 1.142(c)(4)).

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that–

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses

which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

. . . .

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5).

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and

promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996, and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, or the Social Security Act, by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4

shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties–*

. . . .

(2) *Animal and Plant Health Inspection Service. . . .*

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section.

The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as "Webster's."

. . . .

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

§ 11.7 Certification and licensing of designated qualified persons (DQP's).

(a) *Basic qualifications of DQP appli*cants. DQP's holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

(i) Members of the American Association of Equine Practitioners, or

(ii) Large animal practitioners with substantial equine experience, or

(iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent)

and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing

live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and

maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection

for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

(i) The name and address, including street address or post office box and zip code, of the show and the show manager.

(ii) The name and address, including street address or post office box and zip code, of the horse owner.

(iii) The name and address, including street address or post office box and zip code, of the horse trainer.

(iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.

(v) The exhibitors number and class number, or the sale or auction tag number of said horse.

(vi) The date and time of the inspection.

(vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.

(viii) The name, age, sex, color, and markings of the horse; and

(ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department

certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's,

and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to

follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire

> 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .7 (1998) (footnotes omitted).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Statement of the Case

Respondent's address is 179 Stewart Lane, McMinnville, Tennessee 37110. In 1998, Respondent, who has exhibited Tennessee Walking Horses for about 12 years, owned seven horses, including Jackie O. They were boarded with and trained by Don Milligan. One of Don Milligan's employees was Jessie Smith who had trained some of Respondent's ribbon-winning horses. Sometime in June or July 1998, Respondent moved his horses to his own barn and hired Jessie Smith to train them. (CX 4; Tr. 44, 107-11, 117-18, 132.) Respondent testified that he told Jessie Smith that he "didn't want [his] horses abused in any shape, form or fashion" (Tr. 111, 116-17). Respondent, who has had no previous violations of the Horse Protection Act, said that he did not see Jessie Smith abuse any of the horses (Tr. 111-13, 137).

Jessie Smith entered Jackie O and two other horses on Respondent's behalf in the 30th Anniversary National Walking Horse Trainers Show as entry number 392 in class 24 (CX 2 at 1; Tr. 111, 113, 119-20). On October 28, 1998, two DQPs[3] and two experienced Animal and Plant Health Inspection Service veterinarians, David C. Smith, DVM, and John Edward Slauter, DVM, examined Jackie O at the 30th Anniversary National Walking Horse Trainers Show before Jackie O's exhibition (CX 3).

Dr. Smith testified that he remembered his examination of Jackie O and that he had prepared an affidavit after his examination (Tr. 12-15). In his affidavit (CX 3 at 2), Dr. Smith stated:

> At approximately 18:13 I observed DQPs Harry Chaffin and Mark Thomas examining entry # 392 in Class # 24, a two year old grey mare known as "JFK O My Jackie O." The horse appeared very uncomfortable

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[3] A "DQP" (Designated Qualified Person) is a person appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

during the exam. It was tense, and was leaning over to try to escape the pain elicited by the DQPs' exams. This leaning was to the point that the horse looked as if it might fall over at any time. I could see the horse trying to jerk both fore feet away from the DQPs as they did the palpation portions of their exams. A ticket for bilateral soring was issued by the DQPs.

At 18:20, I examined the horse. The horse's locomotion was stiff and cautious. When I palpated the forefeet, using gentle pressure from the ball of my thumb, I found that both forefeet were painful. The painful areas started in the area just proximal to the medial heel bulb and extended all the way around the medial, dorsal, and lateral aspects of the pastern to area just proximal to the lateral heel bulb. This was consistent in both forefeet. The horse jerked its feet away vigorously as I palpated these areas. This pain response was very easy to reproduce.

Dr. Smith testified that Jackie O was one of the sorest horses that he has seen and that Jackie O would have experienced pain if exhibited (Tr. 13, 20-21).

Dr. Slauter then examined Jackie O. He testified that he did not remember his examination but that he had prepared an affidavit at the time concerning his examination (Tr. 59-60). In his affidavit (CX 3 at 5), Dr. Slauter stated:

Dr. Smith asked me to examine the horse. The horse led around a stationary cone. It led up unsteady and was very reluctant to move. As I palpated the left pastern I was able to get repeatable pain responses to palpation of numerous areas all around the pastern. I noticed a head jerk and the horse wanted to lean over on me as I found pain responses around the left pastern[.] The horse also had a pronounced left foot withdrawal to the pain responses on palpation.

I then examined the right foot. Once again the horse gave me a pronounced foot withdrawal as I found repeated pain responses to palpation at numerous areas all around the right pastern. Again the horse was in such pain it almost leaned over on me as I palpated the pasterns.

Dr. Smith and I discussed our findings and the horse. In our professional opinions we agreed that the horse was bilaterally sore from either mechanical or chemical means or a combination thereof.

Dr. Smith and Dr. Slauter then completed and signed APHIS form 7077 "Summary of Alleged Violations" (CX 3 at 1). Respondent was not present during

the examination of Jackie O. When Respondent learned that Jackie O was found to be sore, he fired Jessie Smith. (Tr. 113-14.)

Complainant alleges that Respondent entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show while sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Amended Compl. ¶ 4). Respondent contends he did not enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show (Respondents' Post-Hearing Brief).

Discussion

The substantial evidence presented by Complainant through the testimony and affidavits[4] of Drs. Slauter and Smith, who were credible witnesses, concerning their findings that Jackie O experienced bilateral pain in its forelimbs when examined, raises the presumption under section 6(d)(5) of the Horse Protection Act (15 U.S.C. § 1825(d)(5)) that Jackie O was sore.[5] Respondent offered no evidence to rebut this presumption. Accordingly, I find that Jackie O was sore when entered in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998.

Respondent personally and through his agent, Jessie Smith, entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show, while Jackie O was sore.

Respondent, however, contends that he did not violate the Horse Protection Act because he did not know Jackie O was sore and he had specifically directed the horse's trainer, Jessie Smith, not to sore the horse (Respondents' Post-Hearing Brief at 8-9). However, Respondent's lack of knowledge that Jackie O was sore and Respondent's instructions to his trainer are not defenses to a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). An owner of a walking horse, such as Respondent, is an "absolute guarantor" that the horse he enters, either personally or through his agent, will not be entered in a show while sore. A horse owner is therefore liable for a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) if he or she enters a sore horse in

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[4]An affidavit prepared while events are fresh in the writer's mind is considered reliable and probative. *In re Cecil Jordan,* 51 Agric. Dec. 1229 (1992) (Remand Order).

[5]*In re Jack Stepp*, 57 Agric. Dec. 297, 310 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 560 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 906 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 872 (1996); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 314 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *In re Eldon Stamper*, 42 Agric. Dec. 20, 27 (1983), *aff'd*, 722 F. 2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

a horse show for the purpose of showing or exhibiting the horse even if the owner is actually unaware that the horse is sore. As an "absolute guarantor," an owner is likewise liable for a violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) even if the owner instructed the trainer not to sore the horse.

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[6] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation. 15 U.S.C. § 1825(c).

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

> The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

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[6] 62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(vii).

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act provides that the Secretary of Agriculture shall determine the amount of the civil penalty, as follows:

> In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Complainant recommends that I assess Respondent a $2,200 civil penalty (Complainant's Post-Hearing Brief at 34-36). The extent and gravity of Respondent's prohibited conduct are great. Jackie O was one of the sorest horses ever examined by Dr. Smith (Tr. 13, 20-21). Respondent hired a full-time trainer without inquiring as to his record of Horse Protection Act violations and gave him complete control with respect to the method of training Jackie O (CX 4 at 2; Tr. 123-24, 129). Respondent both personally and through his agent entered Jackie O in the 30th Anniversary Walking Horse Trainers Show while Jackie O was sore. Under these circumstances, I find that Respondent has a high degree of culpability for the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Respondent presented no evidence that he is unable to pay a $2,200 civil penalty and presented no evidence that the payment of a $2,200 civil penalty would adversely affect his ability to continue in business.

In most Horse Protection Act cases, the maximum civil penalty per violation has

been warranted.[7] Effective September 2, 1997, the Secretary of Agriculture adjusted the maximum civil penalty for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[8] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Respondent a $2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically

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[7]*See, e.g., In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

[8]See note 6.

provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[9]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is

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[9]*In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in*, 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

warranted.

Findings of Fact

1. Respondent is an individual whose address is 179 Stewart Lane, McMinnville, Tennessee 37710. At all times material to this proceeding, Respondent was the sole owner of Jackie O.

2. Respondent employed Jessie Smith as his employee and agent to train Jackie O for exhibition.

3. Respondent personally and through his agent, Jessie Smith, entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998, for the purpose of showing or exhibiting Jackie O.

4. Jackie O manifested abnormal bilateral sensitivity in both of its forelimbs when examined by two experienced veterinarians when Jackie O was entered in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998, and Jackie O would be expected to experience pain if shown or exhibited.

Conclusion of Law

Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) when he entered Jackie O for the purpose of showing or exhibiting the horse in the 30th Anniversary National Walking Horse Trainers Show on October 28, 1998, while Jackie O was sore.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant's Appeal Petition

Complainant requests in "Complainant's Petition for Appeal of Decision and Order" [hereinafter Complainant's Appeal Petition] that I modify the sanction imposed against Respondent by the Chief ALJ. First, Complainant contends the Chief ALJ erroneously failed "to base his order on the adjusted maximum civil penalty." (Complainant's Appeal Pet. at 2 (emphasis in original).)

The Chief ALJ assessed Respondent a $2,000 civil penalty for his violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Initial Decision and Order at 9). As the Chief ALJ correctly noted, customarily a $2,000 civil penalty has been assessed for each violation of the Horse Protection Act[10]

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[10]*See, e.g., In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table),

(Initial Decision and Order at 7).

Prior to September 2, 1997, the maximum civil penalty that could be assessed for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) was $2,000.[11] However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[12] The United States Department of Agriculture's policy has been to assess the maximum civil penalty for each violation of the Horse Protection Act unless an examination of the factors that must be considered when determining the amount of the civil penalty reveals facts which warrant the assessment of a civil penalty that is less than the maximum civil penalty. I find no basis on the record before me to assess Respondent less than the maximum civil penalty. Therefore, I conclude the Chief ALJ erred by assessing Respondent a $2,000 civil penalty rather than the maximum $2,200 civil penalty.

Second, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Derwood Stewart from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on the statutory factors the Chief ALJ was required to consider when determining the amount of the civil penalty to assess (Complainant's Appeal Pet. at 3-5).

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides that in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the

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printed in 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

[11]15 U.S.C. § 1825(b)(1).

[12]See note 6.

nature, circumstances, extent, and gravity of the prohibited conduct, and with respect to the person found to have engaged in the prohibited conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue business, and such other matters as justice may require. However, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.[13] When a provision is included in one section of a statute and omitted in another section, it should not be implied in the place at which it is omitted.[14] Therefore, I agree with Complainant that the Chief ALJ erred by basing his decision not to disqualify Derwood Stewart on factors required in section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) to be considered when determining the amount of the civil penalty.

Third, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's having exhibited horses in the past without committing any violation of the Horse Protection Act (Complainant's Appeal Pet. at 6).

I agree with Complainant that the Chief ALJ erred by basing his decision not to disqualify Respondent on Respondent's having exhibited horses in the past without committing any violation of the Horse Protection Act. The Horse Protection Act itself provides for minimum periods of disqualification based upon a respondent's compliance history. Specifically, section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that a respondent may be disqualified for not less than 1 year for the first violation of the Horse Protection Act and not less than 5 years for any subsequent violation of the Horse Protection Act. Moreover, while section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) does not require disqualification of persons found to have violated the Horse Protection Act, the Chief ALJ's determination that Respondent should not be disqualified because he had not previously been found to have violated the Horse Protection Act is contrary

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[13]*In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 981 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 890 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 845-46 (1996); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 348 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 319 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994).

[14]*Lang v. Commissioner*, 289 U.S. 109, 112 (1933); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 562 (2d Cir. 1956); *Hamilton v. NLRB*, 160 F.2d 465, 470 (6th Cir.), *cert. denied sub. nom Kalamzoo Stationery Co. v. NLRB*, 332 U.S. 762 (1947); *Cohen v. Great Guns, Inc.* (*In re Sooner Oil & Gas Corp.*), 24 B.R. 479, 484 (Bankr. W.D. Okla. 1982).

to section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)), which specifically provides for a minimum period of disqualification for the first violation of the Horse Protection Act.

Fourth, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's lack of knowledge that Jackie O was sore (Complainant's Appeal Pet. at 6-7).

Congress specifically added the disqualification provisions to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

In order to eliminate the practice of soring, it would seem necessary to impose at least the minimum period of disqualification on respondents found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Intent and knowledge are not elements of the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) and rarely is there any proof of a knowing or intentional violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Since there is almost never any proof of knowledge or intent, if that were cause for not imposing a disqualification order, there would almost never be a disqualification order issued. For most respondents found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), the civil penalty for soring would be an acceptable cost of doing business, and the congressional purpose of eliminating the practice of soring would not be achieved. Therefore, it is well-settled that lack of knowledge or intent is not a circumstance mitigating the sanction for violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).[15] Thus, I conclude the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from

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[15]*In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 323 n.40 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 348 n.21 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 319 n.20 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 209 n.7 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1305 n.5 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims*, 52 Agric. Dec. 1243, 1269 n.6 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1203-04 n.6 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1155 n.16 (1993); *In re Billy Gray* 52 Agric. Dec. 1044, 1087 n.6 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318-19 n.5 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 296 n.7 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 251 n.8 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's lack of knowledge that Jackie O was sore.

Fifth, Complainant contends the Chief ALJ erred by basing his decision not to disqualify Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction on Respondent's having instructed the trainer not to sore Jackie O and having fired the trainer after learning that Jackie O was sore (Complainant's Appeal Pet. at 7-8).

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry. See H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that anyone assessed a civil penalty under the Horse Protection Act may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act. While, as Respondent correctly points out (Respondent's Response at 4-5), disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[16]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum

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[16]See note 9.

disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. Respondent's evidence of his pre-violation instruction to Jackie O's trainer and his post-violation dismissal of Jackie O's trainer do not present the kind of extraordinary circumstances that warrant a departure from the established policy of imposing the minimum disqualification period for the first violation of the Horse Protection Act.

Respondent's Appeal Petition

Respondent raises three issues in "Respondent's Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Respondent's Appeal" [hereinafter Respondent's Appeal Petition]. First, Respondent contends he did not enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show and only Jessie Smith entered Jackie O in the 30th Anniversary National Walking Horse Trainers Show. Specifically, relying on *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993), Respondent contends he did not enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show because he did not complete the entry of Jackie O and Jessie Smith, Jackie O's trainer, performed many of the steps in the process of entering Jackie O. (Respondent's Appeal Pet. at 2-3.)

I find Respondent's reliance on *Elliott* misplaced. The Court in *Elliott* held that "entering" a horse in a horse show is a process and includes all activities required to be completed before a horse can actually be shown or exhibited. *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d at 143, 145. Nothing in *Elliott* requires that all of the steps or any particular step in the process of entry must be personally completed by the owner of the horse (the principal), rather than by the trainer of the horse (the agent of the principal), in order to conclude that the owner entered the horse.

Moreover, the record establishes that Respondent, both personally and through his employee, Jessie Smith, effected the entry of Jackie O (Tr. 43-44, 119-20). Entry of a horse in a horse show, for purposes of liability under the Horse Protection Act includes paying the entry fee, registering the horse, and presenting the horse for inspection. *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994). Respondent decided to exhibit Jackie O at the 30th Anniversary National Walking Horse Trainers Show (Tr. 120), Respondent paid the entry fee to

enter Jackie O in the 30th Anniversary National Walking Horse Trainers Show (Tr. 120), Respondent provided the means to transport Jackie O to and feed and care for Jackie O at the 30th Anniversary National Walking Horse Trainers Show (Tr. 119-20), and Respondent had Jessie Smith present Jackie O for pre-show inspection at the 30th Anniversary National Walking Horse Trainers Show (Tr. 43-44). I agree with the Chief ALJ that Respondent was sufficiently involved in the entry process to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Second, Respondent contends the Chief ALJ erroneously found Respondent liable for Jessie Smith's entering Jackie O in the 30th Anniversary National Walking Horse Trainers Show under the doctrine of *respondeat superior*. Specifically, Respondent contends that Jessie Smith "stepped out of the course and scope of his employment when he sored" Jackie O and Respondent cannot be held liable for the illegal acts of his employee. (Respondent's Appeal Pet. at 3-4.)

As previously discussed, I find Respondent personally performed at least one of the steps necessary for entry of Jackie O into the 30th Anniversary National Walking Horse Trainers Show. Therefore, even if I were to find the Chief ALJ's conclusion that Respondent entered Jackie O through his employee, error, that finding would not alter my conclusion that Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Respondent states he hired Jessie Smith to train Jackie O in horse shows, he did not give Jessie Smith any verbal or written instructions concerning Jackie O's training, he gave Jessie Smith complete custody of the methods and devices to be used in training Jackie O, and Jessie Smith was responsible for training Jackie O, preparing Jackie O for inspection, and presenting Jackie O for inspection (CX 4 at 2; Respondent's Appeal Pet. at 3). Further, the record establishes that Jessie Smith's entry of Jackie O was with Respondent's knowledge and acquiescence. Specifically, Respondent testified that he discussed the entry of Jackie O in the 30th Anniversary National Walking Horse Trainers Show with Jessie Smith, he provided the trailer for Jackie O's transportation to the 30th Anniversary National Walking Horse Trainers Show, he provided a helper to accompany Jessie Smith to the 30th Anniversary National Walking Horse Trainers Show, he provided hay and feed for Jackie O's use during the 30th Anniversary National Walking Horse Trainers Show, and he paid the entry fee necessary for Jackie O to enter the 30th Anniversary National Walking Horse Trainers Show (Tr. 119-20). I find Respondent's claim that Jessie Smith was acting outside the scope of his employment when he entered Jackie O at the 30th Anniversary National Walking Horse Trainers Show while Jackie O was sore, is belied by Respondent's admissions regarding the extent of control he gave Jessie Smith over Jackie O and Respondent's knowledge of and acquiescence in Jessie Smith's entering Jackie O in the 30th Anniversary National Walking Horse Trainers Show. Therefore, I reject Respondent's contention that the Chief ALJ erred when he found Respondent entered Jackie O in the 30th

Anniversary National Walking Horse Trainers Show through his employee, Jessie Smith. The record clearly establishes that Jessie Smith was Respondent's employee and that Jessie Smith's entry of Jackie O was within the scope of Jessie Smith's employment.

Third, Respondent contends he cannot be liable for violating the Horse Protection Act because he meets the tests set forth in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), and *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982) (Respondent's Appeal Pet. at 4).

Section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) prohibits any person from showing or exhibiting, in any horse show or horse exhibition, any horse which is sore; section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) prohibits any person from entering for the purpose of showing or exhibiting, in any horse show or horse exhibition, any horse which is sore; section 5(2)(C) of the Horse Protection Act (15 U.S.C. § 1824(2)(C)) prohibits any person from selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore; and section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) prohibits any horse owner from allowing another person to do one of the acts prohibited in section 5(2)(A), (B), and (C) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B), and (C)). *Baird* and *Burton* hold that a horse owner cannot be found to have allowed another person to do one of the acts prohibited in section 5(2)(A), (B), or (C) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B), or (C)) in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) if certain factors are shown to exist. The Chief ALJ did not conclude and I do not conclude that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, I find *Baird* and *Burton* inapposite.

Timeliness of Complainant's Appeal Petition

In addition to responding to the issues raised by Complainant in Complainant's Appeal Petition, Respondent contends in Respondent's Response that Complainant's Appeal Petition should be dismissed because it was not timely filed (Respondent's Response at 3-4).

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party may file an appeal within 30 days after receiving service of the administrative law judge's decision. The record contains no evidence of the date on which the Hearing Clerk served Complainant with the Chief ALJ's Initial Decision and Order. Therefore, I cannot conclude that Complainant's Appeal Petition was late-filed.

Moreover, on June 28, 2001, Complainant requested that I extend the time for filing an appeal petition. I granted Complainant's June 28, 2001, request, by

extending the time for filing Complainant's appeal petition to July 20, 2001.[17] On July 20, 2001, Complainant made a second request for an extension of time within which to file an appeal petition, and on July 23, 2001, I extended the time within which Complainant could file an appeal petition to July 23, 2001.[18] Therefore, based on the extensions of time granted to Complainant, I conclude that Complainant's Appeal Petition, which Complainant filed on July 23, 2001, was timely filed.

Respondent further contends that Complainant cannot "use an order nunc pro tunc to file its untimely appeal" (Respondent's Response at 4). Complainant made a timely request for an extension of time to file an appeal petition on June 28, 2001. I granted Complainant's request extending the time for filing an appeal petition to July 20, 2001. Complainant's request for a second extension of time was left on the voice mail of the Office of the Judicial Officer on July 20, 2001, before 4:30 p.m., the time the Hearing Clerk's Office closes for the purpose of filing documents in proceedings conducted under the Rules of Practice. Therefore, Complainant's second request for an extension of time was filed before Complainant's appeal petition was due. I was not able to file the Informal Order granting Complainant's July 20, 2001, request for an extension of time until July 23, 2001. As Complainant's Appeal Petition had been due July 20, 2001, I issued the July 23, 2001, Informal Order *nunc pro tunc*. Under these circumstances, I conclude that my granting Complainant's July 20, 2001, request for an extension of time *nunc pro tunc* was not error.

Respondent further contends he was denied the opportunity to submit his views on Complainant's June 28, 2001, and July 20, 2001, requests for extensions of time to file an appeal petition (Respondent's Response at 4).

Section 1.147(f) of the Rules of Practice (7 C.F.R. § 1.147(f)) provides that in all instances in which time permits, notice of a request for an extension of time shall be given to the other party with opportunity to submit views concerning the request. The record does not indicate that Respondent was given notice of Complainant's requests for extensions of time within which to file an appeal petition. However, time did not permit my giving Respondent an opportunity to submit views on Complainant's July 20, 2001, request for an extension of time. Moreover, the Judicial Officer has long held that because of the backlog of cases before the Judicial Officer, requests for extensions of time have been routinely granted without burdening the opposing party with the opportunity to submit views concerning the requests and the Judicial Officer put litigants on notice that this practice will continue at least until the backlog in the Office of the Judicial Officer has been eliminated. See *In re Embry Livestock Co.*, 48 Agric. Dec. 1010 (1989) (Order

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[17]See Informal Order filed June 28, 2001.

[18]See Informal Order filed July 23, 2001.

Denying Respondent's Request to Set Aside Extension of Time). The backlog in the Office of the Judicial Officer has been significantly reduced since 1989, when *In re Embry Livestock Co.* was decided, but it has not been eliminated. Since I have not previously given any notice that I would no longer follow *In re Embry Livestock Co.*, I follow *In re Embry Livestock Co.* in this proceeding. However, since the backlog in the Office of the Judicial Officer has been substantially reduced, in future cases, I will no longer follow *In re Embry Livestock Co.*, and instead, I will adhere to section 1.147(f) of the Rules of Practice (7 C.F.R. § 1.147(f)).

For the foregoing reasons, the following Order should be issued.

ORDER

1. Respondent is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0028.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

3. Respondent has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is September 6, 2001.
